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No. 1020

In the Supreme Court of the United States

OCTOBER TERM, 1957

JOSEPH SWARTZ AND FREDA SWARTZ, PETITIONERS

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a–3a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1958, and a petition for rehearing was denied on March 24, 1958. The petition for a writ of certiorari was filed on May 23, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the deportation of an alien under Section 241 (a) (11) of the Immigration and Nationality Act of 1952, because of a 1930 conviction on a narcotics charge, violates an asserted constitutional

right of his citizen wife, whom he married in 1942, to continue her marital status with him in this country.

2. Whether the recent holdings of this Court, that application of the deportation provisions of the 1952 Act on the basis of acts committed prior to that Act's promulgation do not violate the *ex post facto* clause of the Constitution, should be reexamined.

STATUTE INVOLVED

The Immigration and Nationality Act of 1952 provides:

> Section 241 [66 Stat. 204; 8 U. S. C. 1251].
>
> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, * * *.
>
> * * * * *
>
> (d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.
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> * * * * *

STATEMENT

The petition for a writ of certiorari seeks review of the judgment of the Court of Appeals affirming the judgment of the District Court which denied petitioner's motion for summary judgment and granted respondent's motion for judgment on the pleadings, in a declaratory judgment action seeking relief from a deportation order entered against petitioner Joseph Swartz.

The relevant facts, which are not in dispute, may be summarized as follows:

On August 3, 1908, petitioner Joseph Swartz, a native of Rumania, entered this country as a permanent resident, and has since resided continuously except for an absence of about two days in Canada during 1920 or 1921 (R. 3). On July 16, 1930, he pleaded guilty in the United States District Court for the District of Minnesota to the first count of a two-count indictment charging that on June 30, 1927, he unlawfully sold morphine (R. 3).

On January 15, 1942, Joseph Swartz married Freda Swartz, who had been naturalized on June 13, 1939 (R. 2, 8). A child was born of this marriage on May 13, 1946 (R. 8).

In 1953, deportation proceedings were instituted against Joseph Swartz under Section 241 (a) (11) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1251 (a) (11), *supra*), based on the 1930 narcotics conviction. In February 1955, he was ordered deported (Pet. 5).

On July 25, 1956, petitioners instituted this declaratory judgment action in the District Court. They

filed a motion for summary judgment based on the facts admitted in the pleadings (R. 5), and respondent filed a counter-motion for judgment on the pleadings (R. 10). The District Court postponed decision pending this Court's ruling in *Mulcahey* v. *Catalanotte,* No. 435, O. T. 1956 (R. 9), since one of the principal contentions raised in the amended complaint (R. 4) was that Section 241 (a) (11) of the 1952 Act (*supra*) (R. 4) "does not affect the status of a person who was non-deportable prior to the effective date of said provision and who has not committed any act since that date which would place him under the terms of said provision." Following this Court's decision in *Mulcahey* v. *Catalanotte,* 353 U. S. 692, which resolved this issue contrary to petitioners' position, the District Court, on July 15, 1957, denied petitioners' motion for summary judgment and granted respondent's motion for judgment on the pleadings (R. 9–10). The court overruled the claim of the wife that deportation of her husband would violate her constitutional rights.

ARGUMENT

1. Petitioner Freda Swartz contends (Pet. 7–12) that the deportation of her husband would deprive her of her own right to the continuation of her marital status in this country—a right which she contends is secured to her by the due process clause of the Fifth Amendment. Her position seems to be that her marriage in 1942 gave her a "vested" right to her marital status in this country (Pet. 11), and that it was beyond the power of Congress to divest her of

this "right" on the basis of an act of her husband occurring prior to the marriage.

In marrying an alien, however, the wife knew, or is held to the knowledge, that she was marrying a person who had no vested right to remain in this country. If the husband is deportable, as he clearly is under the decision in *Mulcahey* v. *Catalanotte*, 353 U. S. 692, he does not become non-deportable because he is married to a citizen. His deportation may force the wife to decide whether to accompany him, remain here, or divide her time between this country and another, but it does not directly affect her marital status. Its effect on the marriage is not legally different from that which would result from valid conviction and incarceration of the husband for an act done before the marriage.

Recognizing the hardship that deportation may bring to family life, Congress specifically provided for the discretionary relief of suspension of deportation to certain deportable aliens "whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child * * *" (Section 244 of the Immigration and Nationality Act of 1952, 66 Stat. 214, 8 U. S. C. 1254). Cf. *Dessalernos* v. *Savoretti*, 356 U. S. 269.[1] But the fact of marriage

[1] Joseph Swartz applied for suspension of deportation under Section 244. On February 16, 1955, the Board of Immigration Appeals ruled that, although he was statutorily eligible for relief, the facts and circumstances in his case warranted denial of relief as a matter of administrative discretion. Subsequent motions to set aside that order and to reopen the proceedings were also denied. Petitioner has not challenged the denial of

to a citizen is not a limitation on the Congressional power to decide that an alien is now an undesirable resident, and directing his expulsion for the type of past conduct which the Court has held to be a valid ground for present deportation.

2. Petitioner Joseph Swartz also contends that the application of Section 241 (a) (11) of the Immigration and Nationality Act of 1952 (*supra*, p. 2) to facts occurring prior to the effective date of the 1952 legislation violates his rights under the *ex post facto* clause of the Constitution (U. S. Const., Art. I, Sec. 9, Cl. 3). This issue has, however, been firmly resolved by this Court against petitioner's contention in a series of recent opinions in which the same argument was made. *Mulcahey* v. *Catalanotte*, 353 U. S. 692, 694; *Lehman* v. *Carson*, 353 U. S. 685, 690; *Marcello* v. *Bonds*, 349 U. S. 302, 314; *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 593–596; *Galvan* v. *Press*, 347 U. S. 522. There is no occasion for further consideration of this question.

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his application for suspension in this proceeding. (The Board of Immigration Appeals did grant Joseph Swartz the privilege of voluntary departure.)

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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